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No. 1145

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1967

WILLIAM ROGER PASCENTE and
FRANK J. FURIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A. 1-5) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1967. A timely petition for rehearing was denied on January 24, 1968. The petition for a writ of certiorari was filed on February 23,

1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavit in support of a search warrant was sufficient to show probable cause.
2. Whether the search warrant described the articles to be seized with sufficient specificity.
3. Whether the search warrant was defective because the commissioner wrote down the information related to him by the affiant, who thereafter signed the affidavit in the commissioner's presence.

STATEMENT

Both petitioners were convicted in the United States District Court for the Northern District of Illinois of possession of goods stolen from interstate commerce in violation of 18 U.S.C. 659. Petitioner Pascente was also convicted of the theft of the goods (R. 4-7). Petitioner Pascente was sentenced to five years' probation on each count, the terms to run concurrently and petitioner Furio received a sentence of eighteen months' imprisonment (R. 61-62). The court of appeals affirmed (Pet. App. A. 1-5).

The evidence, the sufficiency of which is not in question here, established that in the early evening of February 11, 1965, a Mason-Dixon Lines truck containing seven cartons was parked in the company lot (R. 32, 33). Petitioner Pascente, a Mason-Dixon employee who was working that evening, had been observed in the terminal area at about the time a "straight job" truck (similar to truck No. 3792 from

which the cartons in question were taken) was observed leaving the terminal (R. 35, 36). One fellow employee related that petitioner Pascente had told him that he was going to use a company truck for some personal business (R. 38). Another stated that soon after Pascente left his presence, he observed that the "straight job" was gone. He did not see Pascente until he noticed the truck on the lot again (R. 36). The following morning, the terminal manager discovered that five interstate shipments had been taken from truck No. 3792 (R. 29, 30-31). It was stipulated that the goods stolen constituted a shipment in interstate commerce and were valued at $735 (R. 27-28).

After obtaining a search warrant, the FBI agents went to petitioner Furio's residence. After receiving no response to their knocking, they forcibly entered the apartment where they discovered eleven cartons of merchandise. While the agents were drawing up an inventory (R. 16-20), petitioners Pascente and Furio entered and were placed under arrest (R. 40-43).

The issues raised relate primarily to the affidavit in support of the search warrant. It reads in pertinent part:

> The undersigned being duly sworn deposes and says: That he has reason to believe that on the premises known as second floor of a two-family residence at 1913 West Ohio Street, Chicago, in the No. District of Illinois there is now being concealed certain property, namely several cartons of merchandise which constituted interstate

commerce and were stolen therefrom. And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

> This information was furnished affiant by Spec Ag Anthony Genakos of F.B.I. that Paul Picquet Terminal Mgr of Mason-Dixon Lines, Chicago, carrier of freight that he received an anonymous call [*sic*] who stated he was a neighbor, that he observed at 11:30 p.m., Feb. 11, 1965, 2 men unloading truck of said into said residence. Marianne Costello living downstairs her [*sic*] steps up and down stairs at 11:30 p.m. Said terminal [*sic*] stated he found 5 interstate shipments missing from one of their trucks after the time stated. [R. 14.]

The commissioner himself actually transcribed the words as they were related to him by an F.B.I. agent, who then signed the affidavit in the commissioner's presence.

ARGUMENT

1. While the affidavit was concededly written in a hurried and cryptic style (Pet. App. A. 2), it must be read in a non-technical, common-sense fashion so as to grant to the phraseology the full import intended by its authors, *United States* v. *Ventresca*, 380 U.S. 102, 108-109. Thus read, the following salient facts become evident: The Mason-Dixon Lines' terminal manager discovered several interstate shipments missing from a company truck. He also received information by telephone from an unknown caller that at approximately 11:30 on the night of

February 11, 1965, two men were observed transporting the contents of a Mason-Dixon truck into the residence at 1913 West Ohio Street, Chicago, Illinois. After some investigation by the F.B.I., the resident of the downstairs apartment at that address related that she heard persons going up and down the steps at 11:30 p.m.[1] These facts afforded the magistrate a substantial basis for determining that there was probable cause to believe that cartons stolen from the truck were concealed in the second floor apartment. See *Aguilar* v. *Texas*, 378 U.S. 108, 114-115; *Rugendorf* v. *United States*, 376 U.S. 528, 533. That the affiant relied on hearsay is of no consequence, as long as there is a substantial basis for crediting the hearsay. *Jones* v. *United States*, 362 U.S. 257, 272; *United States* v. *Ventresca*, 380 U.S. 102, 108.

Information from an unknown informant may provide probable cause where that information is corroborated by other evidence. Here, the unknown caller's statement that merchandise from a Mason-Dixon truck had been taken into 1913 West Ohio Street at 11:30 p.m. on the night of February 11, 1965, was corroborated by the information from the terminal manager that merchandise was missing from such a truck and by the statement of a resident at the stated address that people were heard going up and down the stairs at the very hour the caller said the merchandise was taken into the house. In these circumstances the information set forth on the face of the

[1] While no date is mentioned in the affidavit one would have to stretch his imagination to assume that the witness had reference to a night other than February 11, 1965.

affidavit clearly provided the magistrate with probable cause to believe that stolen goods were being stored in the apartment. See *Giordenello* v. *United States*, 357 U.S. 480, 487.

2. The search warrant authorized the agents to seize "several cartons of merchandise which constituted interstate commerce and were stolen therefrom" (R. 15). Petitioners argue that the magistrate's utilization of the word "merchandise" is too imprecise to satisfy the Fourth Amendment. However the Fourth Amendment's requirement of particularity is satisfied if the officers can reasonably ascertain and identify the articles from the face of the warrant. See *Steele* v. *United States No. 1*, 267 U.S. 498, 504. There is no requirement that the articles sought be described with exactitude. See *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541, 554. The precision of the description is to be measured in terms of the nature of the goods to be seized and their relationship to the alleged offense. *Katz* v. *United States*, 369 F. 2d 130, 134-135 (C.A. 9), reversed on other grounds, 389 U.S. 347, and cases cited therein.[2] Here, the agents who applied for the warrant knew that the articles sought were of a commercial nature and that the place to be searched was of a residential nature. It

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[2] *Stanford* v. *Texas*, 379 U.S. 476, and the cases cited therein, are inapposite. The warrants in those cases were directed against objects protected by both the First and Fourth Amendments where the particularity test has historically been applied with "scrupulous exactitude". *Id.* at 485. The Court specifically left open the question whether, absent First Amendment considerations, the same warrant would have satisfied constitutional requirements.

would have been highly improbable that the apartment would contain so many cartons of a commercial type that the officers would not be able to identify readily the articles which they sought.[3] Indeed, the record reveals that the agents identified the cartons without any difficulty upon entering the apartment (R. 40-43).

3. At the time the search warrant was issued, the agent orally stated the relevant facts to the commissioner, who prepared the affidavit which the agent then signed. Petitioner asserts that in writing out the affidavit, the commissioner assumed an inquisitorial role. There is no indication, however, that the commissioner did anything more than reduce the agent's statements to writing—a function which was clerical rather than investigatory.

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[3] Petitioners' attempt to suggest a conflict within the Seventh Circuit is unpersuasive. The warrant was held invalid in *Roth* v. *United States* (Pet. App. E) because the affidavit contained erroneous information. Furthermore, the warrant was found to be lacking in specificity because the articles—commercial in nature—were not sufficiently differentiated from other articles of similar nature which might have also been stored in the warehouse which was to be searched.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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